91-598

NO.

In the
Supreme Court of the United States

OCTOBER, 1991 TERM

UNITED STATES OF AMERICA
Respondent

VERSUS

SEABORN R. WICKER
Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT N. HABANS, JR.
HABANS, BOLOGNA & CARRIERE
A Professional Law Corporation
Suite 2323
1515 Poydras Street
New Orleans, Louisiana 70112
Telephone: (504) 524-2323
Attorney for Petitioner,
Seaborn R. Wicker

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Respondent

VERSUS

SEARBORN R. WICKER
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

Petitioner, Seaborn R. Wicker, presents the following questions for review:

I. Whether 18 U.S.C. §215, as it existed from October 12, 1984 through September 4, 1986, was unconstitutionally vague and overbroad.

II. Whether the numerous egregious errors which pervaded the trial cumulate to deny petitioner a fair trial in violation of the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (continued)

CASES **PAGE**

TABLE OF AUTHORITIES (continued)

CASES **PAGE**

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Respondent

VERSUS

SEABORN R. WICKER,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Seaborn R. Wicker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS DELIVERED IN THE COURT BELOW

The Court of Appeals for the Fifth Circuit entered its opinion on May 31, 1991. [Appendix "A"] Thereafter, on July 5, 1991, the Court of Appeals denied petitioner's Petition for Rehearing. [Appendix "B"]

STATEMENT OF JURISDICTION

The Petitioner, Seaborn R. Wicker, was convicted by a jury in the United States District Court for the Eastern District of Louisiana under a three count indictment for violating 18 U.S.C. §371 by conspiring to violate 18 U.S.C.

§§215 and 1344; engaging in bank fraud in violation of 18 U.S.C. §215.

Petitioner appealed his conviction to the Court of Appeals for the Fifth Circuit. Petitioner's conviction and sentence were affirmed in an opinion entered on May 31, 1991. [Appendix "A"] Subsequently, a Petition for Rehearing was filed pursuant to Rule 40, Federal Rules of Appellate Procedure, which was denied on July 5, 1991. [Appendix "B"] In consequence whereof, Petitioner files the instant application for Writ of Certiorari.

Jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). A Writ of Certiorari is sought under the authority of Title 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Seaborn R. Wicker was indicted by a Federal Grand Jury, Eastern District of Louisiana, on January 5, 1990. The three count indictment alleged conspiracy under 18 U.S.C. §371 to violate 18 U.S.C. §215 and 18 U.S.C. §1344, and substantive violations of §1344 and §215. Mr. Wicker plead not guilty and maintains his innocence to this date.

Counts 1 and 3 of the indictment were fatally defective for the reason that §215 was unconstitutionally vague and overbroad in the form in which it was effective from October 12, 1984 through September 4, 1986. Prior to October 12, 1984, §215 did not apply to First Financial which was not insured by the Federal Deposit Insurance Corporation.

The government's factual allegations and proof dealt

with Mr. Wicker's payment for an automobile in about 1984 which was titled in the name of the wife of Malcolm Crow, his loan officer at First Financial of Louisiana Savings and Loan. This was not proof of any material fact since it was not a violation for Mr. Wicker to have paid for that automobile, as this act took place prior to October 12, 1984, the effective date on which §215 became applicable to First Financial. Mr. Wicker considered this a loan to Mr. Crow. Further, that act did not establish unlawful intent for it was not an unlawful act. Additionally, the prosecution offered evidence that a condominium was transferred to First Financial as a commitment fee for the extension of a loan. This was also not illegal; it took place before October 12, 1984 and was not a criminal act, notwithstanding this date.

The government further focused in its opening statement, closing argument and in the proof at trial, on three payments aggregating $25,905. Mr. Wicker did not deny those payments but defended on the basis that they were fees for current work by Crow after terminating his employment with First Financial. Those payments took place after the government's indictment alleged Mr. Crow ceased to be an officer of First Financial. These payments were incorrectly alleged as facts and elements of the offenses charged in the indictment. The jury was erroneously instructed by the Court that proof of those payments by Wicker to Crow would establish one or more of the offenses in the indictment. That instruction was plainly erroneous.

Mr. Crow admitted to having testified at depositions on two occasions and before the Grand Jury in a fashion consistent with his and Mr. Wicker's innocence. After being confronted by FBI agents and having been induced to change his story by promises of assistance by the government in connection with making his "cooperation" known

to a sentencing court, Mr. Crow diametrically changed his testimony. Additionally, Mr. Crow was paid for eight (8) days witness fees in connection with one (1) day of trial testimony, which fees and other expenses were taxed as costs against Mr. Wicker. *Brady* and *Giglio* material regarding these payments to Crow and regarding the extraordinary number of days required for Crow to "study" and "prepare" his testimony was not known to defense counsel and was not available to be used in cross examination. This information was not disclosed until after the jury returned its verdict, notwithstanding three (3) motions for production of exculpatory information filed by the defendant.

After the jury returned its verdict based on an indictment which charged offenses during times when no such offenses existed at law, based upon jury instructions that were inappropriate, and based upon inflammatory and prejudicial opening statement, closing argument and evidence offered by the government, Mr. Wicker was sentenced to a period of three (3) years as to each of Counts 1 and 2 and ordered to pay a fine of $100,000.00 as to Counts 1 and 2, all to run concurrently. And, as to Count 3, imposition of sentence was suspended and Mr. Wicker was placed on a period of probation for five years and directed to perform five hundred (500) hours of community service during probation.

Mr. Wicker appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit pursuant to Title 28, United States Code, Section 1291. The Fifth Circuit affirmed the conviction and sentence of Wicker in an opinion dated May 31, 1991. [Appendix "A"]

Defendant thereafter petitioned the Fifth Circuit for a rehearing, which was denied on July 5, 1991 [Appendix "B"]. Defendant now petitions for a writ of certiorari.

ARGUMENT

I. WHETHER 18 U.S.C. (§215, AS IT EXISTED FROM OCTOBER 12, 1984 THROUGH SEPTEMBER 4, 1986, WAS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.)

Because a conflict has arisen between the U. S. Congress and the Fifth Circuit Court of Appeals involving the constitutionality of a federal statue, the issue presented herein is appropriate for consideration by this court.

Mr. Seaborn R. Wicker was charged in a three count indictment with an 18 U.S.C. §371 conspiracy[1] to violate 18 U.S.C. §§215 and 1344, as well as with substantive violations of those statutes.

The conspiracy, as well as the substantive violation of §215, was alleged to have occurred between 1984 and 1986. At that time, the statute failed to specify any mental element and provided no standards by which persons could conduct themselves to avoid prosecution, nor did it provide standards to govern federal investigators and prosecutors charged with enforcing the statute. [See Appendix "C"] Such a statute which forbids "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 70 L.Ed.2d 322, 328, 46. St. Ct. 126, 127 (1926).

---

[1] After Mr. Wicker's case was heard by the Fifth Circuit, the Eleventh Circuit decided *U.S. v. Falcone*, 934 F.2d 1528 (11th Cir. 1991) finding 18 U.S.C. §371 inappropriately applied to private banks and limiting application of §371 to offenses where the United States is the target of criminal conduct. Although not raised in the Fifth Circuit, this additional infirmity should be considered by this Court.

Congress itself determined that the former §215 was fatally vague. In 1986, Congress struck out the previous language and replaced it with new language requiring a mental element. The statute now makes criminal the giving of a thing of value to a bank officer only when that giving was done "corruptly," and only when it was done "with intent to influence or reward" the bank officer. The House Report accompanying the changes clearly stated Congress' view that the statute was unclear, would potentially punish innocent conduct, and gave too much discretion to prosecutors. See *U.S. Code Cong. and Admin. News,* Legislative History P.L. 99-370, 1782, 1784. Unfortunately, Congress' invalidation of former §215 did not deter the prosecutors, who prosecuted Mr. Wicker for alleged conduct under the nebulous terms of the former statute.

To satisfy the elements of due process, a statute must define an offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, 75 L.Ed.2d 903, 909, 103 S.Ct. 1855, 1858 (1983). Laws which impose criminal liability are subject to heightened scrutiny in this regard. *Barenblatt v. United States,* 360 U.S. 109, 3 L.Ed.2d 1115, 79 S.Ct. 1081(1959); *Kolender, supra.* Former §215 cannot withstand this scrutiny. This court need not parse the language of the statute or inquire into the everyday meaning of its terms in order to conclude that the statute is vague; Congress has already made that determination.

As an initial matter, former §215 did not provide sufficient notice as to what conduct was prohibited. The statute was violated whenever a person, directly or indirectly gave, offered or promised anything of value to a bank employee, officer, or agent "in connection with any

transaction or business" of the bank. By including all manner of seemingly innocent conduct within its reach, the statute unfairly forces members of that industry to conduct their daily business subject at any time to the "widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89, 65 L.Ed. 516, 41 S.Ct. 298, 300 (1921).

This lack of notice is compounded by the fact that former §215 contained no requirement of any mental element. This Supreme Court has "long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Colautti v. Franklin*, 439 U.S. 379, 395, 58 L.Ed 2d 596, 609, 99 S.Ct. 675, 685 (1979). Here, however, it did not matter whether the thing of value was given or offered with a corrupt intent or with the most innocent of intentions. Thus this statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 29 L.Ed.2d 214, 217, 91 S.Ct. 1686, 1688 (1971).

But the real constitutional failing in former §215 is in the unfettered discretion that it gives to federal regulators and prosecutors. This Supreme Court has recognized repeatedly that the second element of the vagueness doctrine, the desire to avoid arbitrary or discriminatory prosecutions, is the most important. *Kolender, supra*, 461 U.S. at 358. A law, such as former §215, which provides no discernible guidelines for its enforcement "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory

application." *Grayned v. City of Rockford*, 408 U.S. 104, 109, 33 L.Ed.2d 222, 92 S.Ct. 2294, 2299 (1972).

The House Report explicitly recognized this failing of former §215. In considering the proposed changes to §215, the House of Representatives Subcommittee on Criminal Justice conducted hearings. During those hearings, members of the House expressed their concern that members of the banking industry would be left in a quandary about when acceptably legal conduct becomes unacceptable. The Department of Justice appeared before the Subcommittee and suggested that the banking and financial community should "trust its prosecutorial judgment" in determining what conduct should be prosecuted under the statute. The House Report concluded that "the Justice Department approach of relying upon the discretion of federal prosecutors leaves open the possibility of vindictive prosecution and does nothing to prevent innocent people who are not engaged in culpable or wrongful conduct from being stigmatized as criminals." H. R. Rep. No. 335, 99th Cong., 1st Sess. at 4-5 (1985). For these reasons, Congress struck out the prior language of §215 and replaced it, in its entirety, with the new language requiring corrupt intent.

It is not surprising that the Department of Justice fought to retain their complete discretion over who would be prosecuted under §215 and what would be called a crime. In the wake of public hysteria over the savings and loan crisis, former §215 gave prosecutors an easy weapon to use in order to bring about the prosecutions demanded by the public. As helpful as such sweeping statutes are to prosecutors, however, the Supreme Court has consistently rejected them as violative of due process. In invalidating a Florida vagrancy statute, for example, this Court noted that although the statute could encompass some behavior that was illegitimate, it also included vast amounts of

legitimate behavior. It concluded:

> "Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application." *Papachristou v. City of Jacksonville,* 405 U.S. 156, 171, 31 L.Ed.2d 110, 120, 92 S.Ct. 839, 848 (1972).

Similarly in *Kolender, supra,* this Court invalidated a statute subjecting individuals to criminal liability if they could not provide "credible and reliable identification." This Court there recognized citizens' interest in curbing crime, but held that "[a]s weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." 461 U.S. at 361. These standards apply equally here. The national panic regarding the savings and loan industry does not constitutionalize a statute that vests virtually unlimited authority in prosecutors and juries to determine actionable conduct when the underlying statute is unclear.

Given Congress' own conclusions regarding the lack of clarity in §215 and the potential for vindictive prosecutions, there can be little doubt that §215 is impermissibly vague. However, despite the wording of the statute and the findings of Congress itself as to its vagueness, the Fifth Circuit Court of Appeals failed to find the former version of §215 overbroad or vague under the circumstances of this case. The Court of Appeals determined that to establish that §215 is unconstitutionally vague, Wicker must show that he could not have reasonably understood his conduct was prohibited by the statute and then found that Wicker could not make such a showing. The District Court and Appellate Court below adopted the rationale of *United States*

v. Humble, 714 F. Supp. 794 (E.D.La. 1989) and held the statute to be constitutional as applied.

First, relying on *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 71 L.Ed.2d 362, 102 S.Ct. 1186 (1982), the Court in *Humble* held that to succeed in challenging the statute as vague on its face, "the complainant must demonstrate that the law is impermissibly vague in all its applications." *Humble*, 714 F.2d at 797. Because the District Court in *Humble* held the defendant to an overly high standard in evaluating his facial challenge on vagueness grounds, Mr. Wicker asks that this Court reach a different conclusion.

The Supreme Court specifically rejected such a formalistic approach to facial vagueness challenges in *Kolender, supra*, where Justice O'Connor states that:

> [W]here a statute imposes criminal penalties, the standard of certainty is higher . . . . This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. 461 U.S. at 359 n. 8 (Citations omitted.)

This was the case, for example in *United States v. Cohen Grocery Co.*, 255 U.S. 81, 65 L.Ed. 516, 41 S.Ct. 298 (1921), where the Court concluded that a statute making it a crime to charge an unjust or unreasonable rate for any necessaries was unconstitutionally vague. It is certainly true that some charges for some goods could have been so outrageous as to clearly fall within the prohibitions of the statute. The Court nonetheless invalidated the statute on its face because of the possibility of sprawling inquiries in which the determination of guilt or innocence would be left solely to the opinions of judges or juries as to what was unreasonable. 255 U.S. at 89. Similarly, in *Kolender*,

supra, the Court did not suggest that the statute making it a crime to refuse to provide credible identification could have no valid application. 461 U.S. at 372 (White, J. dissenting). It concluded nonetheless that the statute was unconstitutionally vague on its face because it encouraged arbitrary enforcement. 461 U.S. at 361.

In short, where the Court has been faced, as here, with a strict liability criminal statute which may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections," it has invalidated it on its face as violative of due process. 461 U.S. at 358, citing *Smith v. Goguen*, 415 U.S. 566, 575, 39 L.Ed.2d 605, 613, 94 S.Ct. 1242, 1248 (1974). That a statute may conceivably encompass some conduct that is actually illegitimate does not permit courts to allow the potential for arbitrary prosecutions to go unchecked. The district court in *Humble, supra* distinguished *Kolender, supra* on the ground that it dealt only with a First Amendment facial challenge. The opinion in *Kolender* cannot be so easily dispatched. While Justice O'Connor stated cursorily that the Court was there concerned with the "potential for arbitrarily suppressing First Amendment liberties," nowhere did she identify any First Amendment interests that were implicated by the identification requirement in the statute at issue. *See* Justice White's dissent. This Court stated only that the statute was unconstitutional "because it encourages arbitrary enforcement." *Kolender, supra*, at 361.

Moreover, in *Cohen Grocery, supra*, in which the Court invalidated on its face the statute criminalizing the charging of unreasonable prices, the only constitutional rights mentioned were those implicated by the delegation of "legislative power, in the very teeth of the settled significance of the 5th and 6th Amendments and of other

applicable provisions of the Constitution." 255 U.S. at 92. Identical rights and interests are at stake here. Like the statute in *Cohen Grocery, supra*, former §215 delegated the legislative power to define offenses to juries and prosecutors, and subjected individuals daily to the risk of sprawling and unforeseeable investigations, all in contravention of the Fifth and Sixth Amendments.

Second, the Court in *Humble, supra*, held further, citing *Parker v. Levy*, 417 U.S. 733, 756, 41 L.Ed.2d 439, 458, 94 S.Ct. 2547, 2562 (1974), that "a person whose conduct clearly falls within the statute's prohibitions can not successfully challenge the statute for vagueness." Justice White relied on precisely this reasoning in his dissent in *Kolender, supra*. The Court there expressly rejected this argument, stating that

> "No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on *Parker v. Levy* . . . but in that case we deliberately applied a less stringent vagueness analysis '[b]ecause of the factors differentiating military society from civilian society.' " 461 U.S. at 359 n. 8.

Indeed, where as here the statute is so vague as to put society at risk of arbitrary prosecutions, the Court has repeatedly invalidated statutes as unconstitutionally vague on their face without regard to the propriety or impropriety of the conduct of the individuals challenging the statute. *Kolender, supra; Colautti, supra; Cohen Grocery, supra*. Both *Kolender, supra* and *Colautti, supra* were actions brought seeking a declaratory judgment that the statutes at issue were unconstitutional rather than appeals from convictions under the questionable statutes. Nonetheless, the Court permitted individuals to challenge

those statutes without regard to whether some conduct on their part would clearly fall within the proscriptions of the statutes. It is perverse to say that while Mr. Wicker, the petitioner, could challenge the constitutionality of former §215 in a declaratory judgment action, he cannot make the same challenge when he is being prosecuted under that section.

Third, the Court in *Humble, supra* overlooked the unusual posture of any challenge to former §215. Every other reported case we have located in which a statute has been challenged on vagueness grounds involved a statute that was still in effect and that Congress or a state legislature intended to remain in effect. The rule applied in *Humble, supra* that individuals to whom a statute may constitutionally be applied may not challenge the statute, has its roots in the judicial deference paid to the legislative function of Congress and state legislatures. "[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 37 L.Ed.2d 839, 93 S.Ct. 2908, 2915 (1973). In this case, however, Congress has itself acted to correct what it perceived to be a serious risk of vindictive or arbitrary prosecutions. Congress has determined that individuals should not be subjected to this risk. This Court can and should act to afford the same protection to those individuals who are not adequately protected by Congress' action.

For the reasons set forth above, petitioner Seaborn R. Wicker respectfully requests that the Court declare that

former §215 is unconstitutionally vague and overbroad and dismiss defendant's convictions on Courts I and III of the Indictment.

II. WHETHER THE NUMEROUS EGREGIOUS ERRORS WHICH PERVADED THE TRIAL CUMULATE TO DENY PETITIONER A FAIR TRIAL IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Although the Fifth Circuit Court of Appeals recognized that there may be instances where error could cumulate to affect the defendant's substantial rights, the Appellate Court nonetheless found that Wicker's case was not one of these instances. The exercise of this Court's Supervisory power is necessary to correct the error of the District and Appellate Courts and to insure that a criminal defendant's right to a fair trial is protected.

At the trial, the prosecution made improper and highly prejudicial comments in opening statement and closing argument, including:

(A) Comments on Mr. Wicker's courtroom behavior and demeanor, where Mr. Wicker did not elect to testify and did not place his character at issue in violation of Federal Rule of Evidence 404(a) and the Fifth Amendment of the United States Constitution.

In the prosecution's closing argument, the following statement was made:

> "And, you know, if you notice Mr. Wicker sat here yesterday and laughed during some of the testimony. I don't know if any of you all noticed

> that. He found something about this funny. While the evidence shows that he contributed to the downfall of this institution, he laughs. We are not laughing, ladies and gentlemen, because we know who's had to foot Mr. Wicker's bill. You might laugh, too, though, if you walked away with $199,000 —"

These remarks by the prosecutor constitute misconduct in that they (1) introduce character evidence solely to prove guilt in violation of Federal Rule of Evidence 404(a), (2) violate Mr. Wicker's fifth amendment right not to be convicted except on the basis of evidence adduced at trial, and (3) violate Mr. Wicker's fifth amendment rights by indirectly commenting on his failure to testify at trial. *U.S. v. Schuler,* 813 F.2d 978 (9th Cir. 1987).

Mr. Wicker's courtroom behavior off the witness stand was legally irrelevant to the question of his guilt of the crime charged and was not evidence subject to comment, if this behavior even occurred. See *Schuler, supra; U.S. v. Pearson,* 746 F.2d 787 (11th Cir. 1984).

Further, having elected not to testify, the comment regarding Mr. Wicker having "laughed" is a suggestion that Mr. Wicker made testimonial comment on evidence presented at trial. It was also intended and did inflame and incite the jury against Mr. Wicker for what the prosecutor obviously asserted to be his bad character and bad attitude.

The Court of Appeals found the comments improper, however, it did not find them so egregious in themselves as to rise to the level of plain error.

(B) personal statements of the prosecutor's knowledge and "golden rule" arguments in violation of

Mr. Wicker's Fifth Amendment due process rights under the United States Constitution.

The prosecution made the following improper personalizations in argument to the jury:

> "What real estate broker have you ever heard of that pays $25,905 for his clients in a real estate transaction? *I don't know of anybody that would do that* . . . ." (Emphasis added.)

Shortly thereafter, the prosecution states that "*we* wouldn't be here . . . ." (Emphasis added.) and later in rebuttal argument states, "Could *you* and *I* do that?" (Emphasis added.)

In reference to its improper argument that Mr. Wicker caused the "downfall of this institution (First Financial)," the prosecutor compounded that error with the following:

> "We are not laughing, ladies and gentlemen, because *we* know who's had to foot the bill."

This blatant appeal to the prejudice of the jury was a "Golden Rule" violation and implied that taxpayers, like members of the jury, were victims of this conduct.

This "us against them" plea can have no appeal other than to prejudice the accused. Such argument, whether made in the course of a civil or criminal trial, is an improper distraction from the jury's sworn duty to reach a fair, honest, impartial and just verdict according to the facts and evidence presented at trial. *Westboork v. General Tire and Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985). *U.S. v. Bess*, 593 F.2d 749 (6th Cir. 1979).

Again, the Appellate Court recognized these statements to be improper, but not so egregious in themselves as to rise to the level of plain error.

(C) Prosecution comments as to other alleged wrongful acts of Mr. Wicker in violation of Federal Rule of Evidence 404(b) and the Fifth Amendment of the United States Constitution.

In the prosecution's opening statement and closing argument, references are made to other alleged wrongful acts of Mr. Wicker in violation of Federal Rule of Evidence 404(b). In opening statement, the prosecutor said:

> "the defendant obtained literally millions of dollars from Crow, or through Crow as his loan officer from late 1983, until January of '85, . . ."
>
> * * *
>
> "Just about all of the loans that Mr. Wicker made or was involved in at First Financial through Crow went bad and eventually in 1987, First Financial was broke. . . ."

Additional statements of the prosecutor, quoted above in Section II(A) of this Petition, *supra*, improperly make reference to Mr. Wicker's contribution "to the downfall of this institution." This is not a case of one isolated statement. Rather, at many points in argument, the prosecution makes such reference. At other points in closing, the prosecution states, "that all of the loans . . . they all went into default." Another prejudicial and inflammatory statement by the prosecutor rising to the level of misconduct was: "It can't help whoever is left holding the bag."

The statements of the prosecutor improperly imply the existence of serious extrinsic offenses and surely prejudiced Mr. Wicker's right to be tried only for the crime charged in the indictment. *U.S. v. McPhee*, 731 F.2d 1150 (5th Cir. 1984).

The prejudice created by the persistent misconduct of the prosecutor in the argument was magnified by the nature of the case. The Savings & Loan crisis is a problem of broad dimensions. To imply that Mr. Wicker has contributed to and/or caused this crisis in general or that he personally bears responsibility for the failure of First Financial is extremely prejudicial, particularly when Mr. Wicker was never charged with such an act.

Again, the Appellate Court recognized that these comments may have mislead the jury, however, found that a curative instruction by the Court and the weight of the evidence compensated for any prejudicial effect.

(D) Prosecution comments bolstered the credibility of its key witness and misused evidence of a witness' guilty plea to imply guilt of Mr. Wicker in violation of his Fifth Amendment due process rights under the United States Constitution.

The prosecution first mentioned that Malcolm Crow "admitted his guilt" * * * "for his part in the conspiracy and in the receipt of the payment."

In the prosecution's closing argument, the following statement was made:

> "If it was a legitimate fee for brokering that Malcolm Crow did, why would Malcolm Crow plead guilty to two felony counts if he had gotten this $25,905 when he did some real work for Mr. Wicker —"

It is obvious that the prosecution's only motivation in making these statements was to suggest that because Malcolm Crow plead guilty, he must be telling the truth. It is improper for a prosecutor to assert his personal opinion about the veracity of a witness or attempt to bolster that witness' testimony. *U.S. v. Murrah*, 888 F.2d 24 (5th Cir. 1989); *U.S. v. Corona*, 551 F.2d 1386 (5th Cir. 1977).

Furthermore, the *Murrah* court also recognized that the remarks of a prosecutor carry with them the imprint of the Government's stamp of approval and the jury may be inclined to trust the Government's judgment rather than its own view of the evidence. Thus, the obligations of fair play by the prosecuting attorney is accentuated. *Murrah, supra*, at 27 citing *U.S. v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 1047, 84 L.Ed.2d 1, 14 (1985). The comments at issue here violated that obligation of fair play and substantially prejudiced Mr. Wicker and tainted his trial.

Additionally, the argument of the prosecutor also improperly suggested to the jury that because Malcolm Crow plead guilty, Mr. Wicker must also be guilty and that they should convict Mr. Wicker for that reason. Attempting to persuade the jury to misuse evidence of another's plea of guilty by considering it as evidence of the accused's guilt is improper. *U.S. v. Miranda*, 593 F.2d 590 (5th Cir. 1979).

As the Court so aptly noted in *Miranda*,

> "It is doubtful that **any** curative instruction, promptly given or otherwise, could have erased the prejudice from the minds of the jurors." 593 F.2d 595.

Where it cannot be said with certainty that a prompt curative instruction eliminated the prejudice, any doubts

should be resolved in favor of Mr. Wicker. However, recognizing the improper nature of the comments, the Court of Appeal nonetheless erroneously found that a curative instruction eliminated the prejudicial effect.

In addition to the improper and hightly prejudicial comments made by the prosecution, *all of which this Court recognized as improper,* the following errors were committed during the trial:

(E) The prosecution failed to timely disclose *Brady* and *Giglio* material in violation of the dictates of the United State Supreme Court and in violation of the Fifth Amendment to the United States Constitution.

Three (3) motions were timely filed by the defendant requesting *Brady* and *Giglio* material (1/26/90; 3/26/90 and 4/10/90). Despite these requests and the Court's order requiring the U.S.A. to produce exculpatory evidence, the government failed to produce to defendant evidence that the government's key witness, Malcolm Crow, was paid for at least eight (8) days based on a witness fee of $30.00 per day for a one and one-half day trial. The defendant did not discover this until the government sought to tax "costs" to the defendant following the trial of this matter. In view of the fact that an extraordinary amount of money was paid to Mr. Malcolm Crow by the government for the one and one-half (1 1/2) day trial, the jury could reasonably infer from the government payments that Mr. Crow required an extraordinary amount of "study" and "preparation" to be able to testify in the fashion that he did at trial. As was admitted at trial, Malcolm Crow testified quite differently in appearances before the U.S. Grand Jury and at trial. In determining whether to give credit to Mr. Crow's "version" of events related at trial, the jury should have known about the extraordinary "study" and "preparation" that

Mr. Crow engaged in before trial, as reflected by the amount of payments from the government.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the prosecution must disclose to the defendant evidence that is favorable to the accused and material either to guilt or punishment. It is also clear that "when the reliability of a given witness may well be determinative of guilt or innocence," evidence affecting the credibility of such witness must be produced under this general rule. *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Failure to disclose such evidence violates a defendant's due process right to a fair trial. *Brady, supra; Giglio, supra.*

As the Court of Appeals stated herein, "a witness fee constitutes impeachment evidence and is contemplated by *Giglio.*" The defendant filed three (3) motions requesting *Giglio* material. Because the nondisclosed evidence could "in any reasonable likelihood have affected the judgment of the jury," a reversal is required on this issue alone. Its cumulation with the multitude of other errors should clearly require reversal.

(F) The prosecution mislead the jury and the Court misinstructed the jury that conduct, which occurred prior to the enactment of §215 and therefore noncriminal in nature was actually the illegal conduct charged in the indictment.

Rule 404(b) of the Federal Rules of Evidence disallows the introduction of evidence of other bad acts to show that the defendant "acted in conformity therewith." However such evidence is admissible for other purposes such as to show motive, preparation or a concerted plan.

Rule 404(b) calls for a two step test to determine

admissibility. It must first be determined that the extrinsic evidence is relevant to an issue other than the defendant's character. Second, the determination must be made whether the probative value of extrinsic evidence is outweighed by its undue prejudice and meets the other requirements of Rule 403. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978).

Prosecutors used this rule to introduce evidence of other alleged bad acts of the defendant on the theory that it established defendant's intent. (Mr. Wicker did not deny payments to Mr. Crow, but disputes the reason or *quid pro quo* for such payments.) The relevance of extrinsic evidence pivots squarely upon the existence of one crucial element of similarity:

> "Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charge offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense." *United States v. Beechum, supra* at 911.

The prosecutor alleged in opening statement that Mr. Wicker gave a bank officer (Malcolm Crow) a Lincoln Town Car worth $24,000 in May 1984. This conduct was not prohibited by 18 U.S.C. §215 in May, 1984. The acts of Mr. Wicker before October 12, 1984 were not unlawful or improper and a transaction regarding a car between the defendant and Mr. Crow before October 12, 1984 was not relevant to the unlawful intent of the defendant and cannot be offered as 404(b) evidence. Nonetheless, it was admitted by the Court.

Moreover, the admission of 404(b) evidence has mislead the jury by asserting that *payments* aggregating $25,905 are actually the offense for which Wicker is charged. In opening statement, the prosecutor said that Mr. Wicker paid "$25,905 in 1985 for Crow's financial loan that involved Wicker which was in January of '85, and that it was about two weeks before Crow left that institution as senior vice president, loan officer." But the indictment alleged that the *payments* aggregating $25,905 were made on February 4 and 14, 1985 and on March 11, 1985. The indictment further alledged that Mr. Crow was "a senior vice-president and loan officer. . . until January 31, 1985."

Also, in the opening statement, the prosecutor said that "[t]he focus of this case. . .is about Mr. Wicker, the defendant, *paying off* Malcolm Crow in connection with business at First Financial. That's the focus of this case." (Emphasis added.) Unfortunately for the government, their indictment alleged Mr. Crow was employed at First Financial only until January 31, 1985, and not during the month of February and March, 1985 when the alleged payments were made. Therefore, the "focus" of the case being the *payment* of $25,905 to Mr. Crow after he departed First Financial is misplaced and prejudicial.

Furthermore, the Court gave the following instructions to the jury:

> "Count 3 of the indictment charges not that he gave Mr. Crow a Lincoln Continental, or use of a condominium, but he *gave* him $25,905 to corruptly influence him in connection with the transaction.
>
> * * *
>
> However, if you find beyond a reasonable doubt

that $25,905 was *transferred* from Mr. Wicker to Mr. Crow and if the issue is then in your mind whether or not whether Mr. Wicker *transferred* the $25,905 he did it with an intent to violate the law, or he did it corruptly, then you may consider and give it whatever weight you deem appropriate the similar acts . . ." (Emphasis added.)

There is *no* allegation in the indictment that Crow had any capacity with First Financial after January 31, 1985. Under the circumstances and consistent with the facts pleaded in the indictment, Mr. Wicker has been convicted for the *payment* of $25,905 to a non-officer of any financial institution, an act which was not a crime at the time alleged. Since the jury could have concluded based on the government's opening statement, the Court's jury charge and the wording of the indictment that Mr. Wicker somehow actually committed the crime by actually paying $25,905 to Crow after Crow ceased to be an officer of First Financial, Mr. Wicker's indictment can not stand.

Although the FIfth Circuit Court of Appeals recognized that there may be instances where error could cumulate to affect the defendant's substantial rights, the Appellate Court nonetheless found that Wicker's case was not one of those instances. [Appendix "A"]

While it is true that any one of these errors standing alone might not be enough to require reversal of defendant's conviction, it is beyond question that the errors and improprieties taken as a whole and which pervaded the trial, clearly affected substantial rights of the defendant.

Perhaps the most important problem facing the jury was its decision whether to credit the testimony of the government's key witness Malcolm Crow. Among the credibility factors which could have been taken into con-

sideration by the jury relating to Mr. Malcolm Crow were the following:

(1) He was an alleged accomplice;

(2) He received a grant of use immunity from the government;

(3) He received a plea agreement that limited the punishment he would receive;

(4) He would derive personal advantage by his assistance, from the government, and he was paid travel and other expenses regarding his testimony.

(5) He was one who abused alcohol at or around the time of the offenses alleged in the indictment and was committed to institutional care for that alcoholism within two or three months after leaving the employment of First Financial; and

(6) He had a vital interest in the outcome of the case, for Crow would reasonably expect the government's intercession and recommendation of favorable treatment to a sentencing judge. Again, it should be noted that Mr. Crow's sentencing was continued about five or six times to keep the leverage over his head.

While the district court instructed the jury that they should "never convict any defendant on the unsupported testimony of such a witness, unless you believe that witness and that testimony beyond a reasonable doubt," that jury was certainly influenced to embrace the testimony of Malcolm Crow due to the numerous instances and as consequence of the improper argument of the prosecutors. Contrary to the government's argument that the evidence was overwhelming, the evidence was *de minimis*

on the issue of Steve Wicker's corrupt intent, which came *only* out of the mouth of Malcolm Crow. Under the circumstances, the government's improper argument and the other errors relating to jury instructions, defects of the indictment, and the substantial other error asserted herein by Mr. Wicker, all impacted the jury's credibility determination process.

The entire atmosphere of the trial was rendered so totally contaminated with bias and prejudice against the defendant so as to deny him his presumption of innocence and due process secured to him by the Constitution.

CONCLUSION

WHEREFORE, this honorable Court is respectfully requested to grant a Writ of Certiorari to review the lower court judgment and reverse petitioner's conviction and sentence.

Respectfully submitted this 30th day of September, 1991.

HABANS, BOLOGNA &
CARRIERE
A Professional Law Corporation

ROBERT N. HABANS, JR.
(6395)
Suite 2323
1515 Poydras Street
New Orleans, Louisiana 70112
Telephone: (504) 524-2323
Attorney for Petitioner,
Seaborn R. Wicker

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991 TERM

UNITED STATES OF AMERICA
RESPONDENT

VERSUS

SEABORN R. WICKER
PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to Honorable Kenneth W. Starr, Solicitor General, Department of Justice, 10th and Constitution Avenue, N.W., Room 5614, Washington, D.C. 20530, Ms. Jan M. Mann and Harry W. McSherry, Jr., Assistant United States Attorneys, Hale Boggs Federal Building, 501 Magazine Street, Room 210, New Orleans, Louisiana 70130 by depositing same in the United States Mail, properly addressed and first class postage prepaid.

NEW ORLEANS, LOUISIANA, this 30th day of September, 1991.

ROBERT N. HABANS, JR.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3631

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SEABORN R. WICKER,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(May 31, 1991)

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges.
CLARK, Chief Judge:

I.

Seaborn R. Wicker appeals his conviction under a three count indictment for violating 18 U.S.C. § 371 by conspiring to violate 18 U.S.C. §§ 215 and 1344; engaging in bank fraud in violation of 18 U.S.C. §§ 1344 and bribery in violation of 18 U.S.C. § 215. Wicker raises numerous points of error. We affirm.

II.

On January 5, 1990 Wicker was indicted in a three count indictment for conspiring to defraud a financial in-

stitution in violation of 18 U.S.C. § 1344 and conspiring to bribe an officer of a financial institution in violation of 18 U.S.C. § 215, as well as with substantive violations of 18 U.S.C. §§ 1344 and 215. Wicker was convicted by a jury on all three counts. Wicker was sentenced to three years of imprisonment on Counts I and II, to run concurrently, and fined $100,000 as to both counts. Wicker's sentence was suspended for Count III, and he was placed on probation for five years and ordered to perform 500 hours of community service.

At trial, the government's primary witness was Malcolm Crow. Crow's testimony revealed the following scenario. In 1984 and 1985, Wicker, a real estate broker was involved in millions of dollars worth of loans from First Financial of Louisiana Savings and Loan (First Financial). Wicker's loan officer at First Financial was Malcolm Crow, the Senior Vice-President in charge of commercial loans for First Financial.

In December 1984, prior to the closing of a $1,727,000 loan to a Wicker associate, Arthur Lancaster, Wicker approached Crow and offered to give him one and a half percent of the loan if Crow would assure that the loan was made. Although First Financial's policy at the time was to discourage large loans, Crow prepared the Lancaster loan package within a short time and did not undertake the same rigorous financial analysis of the loan which he said he undertook on non-Wicker related loans. The loan closed on January 18, 1985 at Wicker's attorney's office. The closing also encompassed a loan to two other individuals Wicker sent to Crow. Debts on many of Wicker's properties were paid off with the proceeds from this transaction, and Wicker received a check for $199,000. Crow resigned from his position with First Financial in late January.

In February and March of 1985, Crow received three checks from Wicker's company. The checks totalled $25,905, exactly one and a half percent of the loan received by Lancaster. Crow testified that he accepted the $25,905 as a bribe and attempted to conceal those payments by opening a new bank account at a different savings institution where he deposited only the funds from Wicker.

The testimony further showed that Wicker had previously offered Crow financial benefit for help with loans. In April and May of 1984, Wicker, and several associates whom he recommended to Crow, received in excess of $6 million in loans from First Financial. During this time, Wicker purchased a Lincoln Town Car for Crow. The car was put in the name of Crow's wife, and Wicker told Crow that if anyone should ask about the car, Crow should say it was a loan. Wicker also offered a condominium to Crow, and the condominium was accepted by First Financial as a loan closing fee.

Crow also faced charges relating to his involvement with the Lancaster loans. Up until the day of his grand jury appearance, Crow had proclaimed his innocence, claiming that he was not associated with the Lancaster loan because he had resigned in December, 1984 and that the $25,905 was payment for action as a loan broker for Wicker after leaving First Financial. When Crow was confronted by an F.B.I. agent with several documents, including his resignation letter indicating that his resignation was actually not effective until January 31, 1985, Crow admitted that he had been the loan officer on the Lancaster loan and informed the F.B.I. about his dealings with Wicker. Crow pleaded guilty and cooperated with the government as part of a plea bargain agreement.

At trial, Wicker maintained that he believed Crow

had resigned from First Financial at the time of the Lancaster loan and that the $25,905 was payment to Crow for services as a loan broker that occurred after Crow had left First Financial. Wicker contended that Crow had been threatened by the F.B.I. and coerced into admitting guilt for something he had not done. He also contended that the loans he made with Crow's help had actually benefitted First Financial.

III.

Wicker raises four primary issues on appeal. First, he claims that the version 18 U.S.C. § 215 which was in effect at the time of his indictment was unconstitutionally vague. Second, Wicker argues (a) that the indictment is invalid because it alleged predicate acts which occurred prior to the enactment of §§ 215 and 1344 and (b) that the trial court violated Fed.R.Evid. 404(b) by allowing the introduction of evidence relating to this conduct. Third, Wicker points to comments by the prosecution which he argues individually or cumulatively constitute reversible error. Finally, Wicker argues that district court erred in not granting a new trial because of the prosecution's failure to disclose *Brady* material. None of Wicker's claims have merit.

A. Title 18 U.S.C. § 215 is Not Overbroad or Vague as Applied.

Wicker asserts that the version of 18 U.S.C. § 215 under which he was charged was unconstitutionally overbroad and vague. He argues that § 215 as it existed from October 1984 to September 1986 failed to specify any mental element, provided no standards by which persons could gage their actions and provided no guidance to federal prosecutors in enforcing § 215.

The version of § 215 in effect at the time of Wicker's conduct stated in pertinent part:

> (b) Whoever, except as provided by law, directly or indirectly, gives, offers or promises anything of value to any officer, director, employee, agent, or attorney of any financial institution, bank holding company, or offers promises any such officer, director, employee, agent, or attorney to give anything of value to any person or entity, other than such financial institution, shall be fined ....

Wicker argues § 215 is overbroad and vague because it could criminalize ordinary conduct done without corrupt intent. He further claims that when Congress later amended the statute to require a corrupt intent, it tacitly recognized that the previous version (under which Wicker was convicted) was improperly drawn.

Overbreadth

A statute will survive an overbreadth challenge unless it reaches a "substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 102 S.Ct. 1186, 1191, 71 L.Ed. 362 (1982). Overbreadth analysis has been used primarily to invalidate statutes affecting freedoms of expression and association protected by the first amendment. *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). Wicker makes no claim that the conduct § 215 criminalizes is protected by the first amendment. Rather, he maintains that the former version § 215 arguably would have reached all sorts of legitimate business conduct and would criminalize even minor and accepted practices such as taking your banker to lunch. Such conduct could conceivably be within the bounds of the

former § 215. The threat that such conduct would result in criminal prosecution, however, is insignificant when compared with the core conduct which § 215 was and is designed to prohibit. *United States v. Humble* 714 F. Supp. 794, 797 (E.D.La. 1989). "Moreover, as the Supreme Court pointedly added in *Broadrick*, any overbreadth problems that might exist in the [former version of § 215] can 'be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be implied.' " *Id.* at 797 (quoting *Broadrick* 413 U.S. at 615-616). We decline to find the former version of § 215 overbroad under these circumstances.

Vagueness

A statute violates due process if it is so vague that a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited, and if the law provides no explicit standards for enforcement. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). A statute is not presumptively vague because it does not have a specific intent requirement. See *Humble,* 714 F. Supp. at 797-98 and citations therein. To establish § 215 is unconstitutionally vague, Wicker must show that he could not have reasonably understood that *his* conduct was prohibited by the statute. *Parker v. Levy,* 417 U.S. 733, 756 (1974). He may not challenge the vagueness of the statute as applied to others in other situations. *Id.; see also Grayned,* 408 U.S. at 108. Wicker cannot make such a showing.

Wicker's actions fall clearly within the core conduct which § 215 was designed to prohibit and punish. Promising to give a loan officer $25,905.00 to secure a loan for an associate cannot reasonably be understood to be anything other than "giv[ing] offer[ing] or promis[ing] a [thing] of value" to a bank official contrary to the proscription of

§ 215. The fact that the money was transferred after Crow left his position with the bank does not alter the criminality of Wicker's actions. Section 215 clearly prohibits any "offer." The evidence established Wicker offered Crow the money while Crow was employed by First Financial and was in a position to influence the making of the loan. Nor does the fact that Congress subsequently amended § 215 to require a "corrupt" intent strengthen Wicker's argument. His actions were clearly covered by the version of § 215 under which he was charged.

B. The Indictment and Evidence of Other Acts and Loans

Wicker claims that the indictment is invalid because, at the time the predicate acts for the § 215 and § 1344 conspiracy were committed, neither §215 nor § 1344 covered institutions insured by the Federal Savings and Loan Insurance Corporation (FSLIC). He further alleges that evidence concerning these acts was introduced at trial in violation of Fed.R.Evid. 404(b). The district court cured any defect in the indictment by striking the acts in question from the indictment and that the introduction of these acts as evidence does not offend Rule 404(b).

The indictment charged Wicker with conspiracy and substantive violations "beginning at a time unknown ... but prior to April 1984." The indictment also lists as overt acts Wicker's gift of a Lincoln Town Car and a condominium to Crow in May 1984. Both § 215 and § 1344 became effective as to FSLIC insured institutions on October 12, 1984. Wicker objected that these acts were not criminal at the time they were committed. The district court ordered them stricken from the indictment. Assuming the indictment was defective, any defect was cured by the district court's action. Wicker cites no authority to the contrary and has failed to show how the initial inclusion of

these acts on the indictment prejudiced his defense or affected his substantial rights in any way.

Rule 404(b) disallows the introduction of evidence of other bad acts to show that the defendant "acted in conformity therewith." However such evidence is admissible for other purposes such as to show motive, preparation or a concerted plan. A trial court's rulings admitting or excluding evidence will not be reversed except for abuse of discretion. Some substantial right of a party must be affected. *Muzka v. Remington Arms Co., Inc.*, 774 F.2d 1309 (5th Cir. 1985).

The government contends that these acts excluded from the indictment were "inextricably interwined" with the illegal conduct and were necessary to show the relationship between Wicker and Crow. The government also contends evidence about Wicker's defaulted loans was necessary to show Wicker's intent to defraud First Financial. We agree.

Evidence of Wicker's gifts of the Lincoln Town Car and the condominium and of his defaulted loans was reasonably necessary to establish the past relationship between Wicker and Crow and the context and framework in which the loan that involved the bribe occurred. The indictment specifically alleged the defaulted loans. The prosecution also supported its position that these loans were parts of a scheme to defraud with testimony from Crow that he did not closely scrutinize the loans which involved Wicker. The district court did not abuse its discretion in admitting any of this evidence.

C. Prosecutor's Improper Comments

Wicker claims four groups of comments by the

prosecution, separately or cumulatively, constitute reversible error.

Comments Regarding Other Loan Transactions

Wicker objects to references in the prosecutor's opening statement and closing argument concerning other loans First Financial made to Wicker which ultimately went bad. The prosecutor stated that Wicker had obtained "literally million of dollars from Crow, or through Crow as his loan officer" and that "[j]ust about all of the loans that Mr. Wicker made or was involved in at First Financial went broke...." The record indicates that the prosecutor made references throughout both the opening and closing statement to defaulted loans, the fact that First Financial failed, and that taxpayer's were footing the bill for First Financial's bailout. The prosecution also put on testimony about the defaulted loans. Wicker's counsel objected on two occasions to these comments pointing out that such information was irrelevant to crimes charged and highly prejudicial. The district court interrupted both the prosecutor's opening statement and closing argument to admonish her for these comments. In a further effort to correct any misperception by the jury the district court instructed the jury as follows:

> Also, while you have heard testimony concerning whether certain financial institutions benefited, or suffered losses, monetary, or otherwise as a result of transactions involving the defendant and others, this fact alone is not determinative of the defendant's guilt or innocence in this case. In other words, you may find the defendant not guilty, even if you find that a financial institution suffered a loss as a result of one or more of these transactions. Such is not evidence of a crime.

> On the other hand, you may find the defendant guilty even if you find that a financial institution benefited from one or more of the transactions, so long as you find that the government has proved the essential elements of the crime beyond a reasonable doubt.
>
> So, whether the financial institution lost money, or gained money isn't the issue in this case. The issue in the case, in a conspiracy charge is whether the two people got together to violate the law. That's what we are here about.

Wicker argues that the prosecutor's comments are reversible error because they effectively put him on trial for the default of these loans and, in the current savings & loan crisis, could only have inflamed the jury and allowed the jury to convict Wicker for actions which were not criminal and for which he was not criminally accountable. While we agree that the comments were improper they do not amount to reversible error in this case.

"A prosecutor's comments to the jury constitute reversible error only when they are both 'inappropriate and harmful.' " *United States v. Lowenburg,* 853 F.2d 295, 301 (5th Cir. 1988) (quoting *United States v. Chase,* 838 F.2d 743, 749 (5th Cir.) *cert. denied sub nom. Mesa v. United States,* 486 U.S. 1035 (1988). Wicker must also show that the prosecutor's remarks affected his substantial rights. *Lowenburg,* 853 F.2d at 302. To determine whether the prosecutors comments affected Wicker's substantial rights we consider: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instruction; and (3) the strength of the evidence of the defendants' guilt. *Id.*

The government argues that the prosecutor's com-

ments about the defaulted loans and about First Financial's failure were responses to Wicker's assertion that his loans were beneficial to First Financial and that he only made gifts to Crow for legitimate non-First Financial work. The government also argues that the testimony about the defaulted loans was necessary to prove Wicker's intent to defraud. Despite the admissibility of the testimony about the defaulted loans, the prosecutor's comments in opening and closing might have mislead the jury into thinking that Wicker was on trial for defaulting on his loans or for causing First Financial's ultimate failure. However, the court's curative instruction and the weight of the evidence against Wicker more than compensate any prejudicial effect that these comments might have had.

The court's instruction was effective and thorough. It's clarity effectively minimized any harmful inferences which might have flowed from the prosecutor's comments. Contrary to Wicker's assertion, the documentary evidence and direct testimony introduced at trial was strong and persuasive. We cannot say that any of Wicker's substantial rights were affected by these comments.

Comment on Wicker's Laughter During Trial

During her closing argument, the prosecutor made the following statement:

> And, you know, if you notice Mr. Wicker sat here yesterday and laughed during some of the testimony. I don't know if any of you all noticed that. He found something about this funny. While the evidence shows that —he— contributed to the downfall of this institution, he laughs. We are not laughing, ladies and gentlemen, because we know who's had to foot Mr. Wicker's bill. You might laugh, too, though, if you walked away

with $199,000..."

Wicker's counsel did not object to these comments. At this point, the district judge interrupted the prosecutor, called a bench conference, and admonished the prosecutor for making an improper argument about the taxpayers footing the bill. The district judge asked the defense counsel if he had an objection to which the counsel replied that he thought the prosecutor's comment about taxpayers footing the bill was improper. At the conclusion of the bench conference, the district judge noted that he was going to give a precautionary instruction to the jury and that he would deny any motion for mistrial, even though Wicker's counsel had made no such motion. The court instructed the jury that consideration of who ultimately picks up the loss when a savings and loan institution insured by the federal government becomes insolvent was not a proper consideration in their decision as to whether Wicker was or was not guilty. The district court did not instruct the jury as to how to treat the prosecutor's comments on Wicker's laughter.

Wicker relies primarily on *United States v. Schuler,* 813 F.2d 978 (9th Cir. 1987) in arguing that the prosecutor's remarks about his laughter at trial constitute misconduct in that they (1) introduce character evidence solely to prove guilt in violation of Fed.R.Evid. 404(a), (2) violate Wicker's Fifth Amendment right not to be convicted except on the basis of evidence adduced at trial, and (3) violate Wicker's Fifth Amendment rights by indirectly commenting on his failure to testify at trial. *Schuler* is distinguishable and we conclude prosecutor's comments are not plain error.

Wicker's trial counsel did not object to the comments about Wicker's laughter. Nor did counsel request

a curative instruction or in any way apprise the district court that he felt the prosecutor's comments were improper. Thus, our review is under the plain error standard. Fed.R.Crim.P. 52 (b). "Plain error may be recognized 'only if the error is so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice.' " *United States v. Montemayor,* 684 F.2d 1118, 1124 (5th Cir. 19__) (quoting *United States v. Graves,* 669 F.2d 964, 971 (5th Cir. 1982)). The burden of showing plain error is a heavy one, *United States v. Pool,* 660 F.2d 547, 559 (5th Cir. 1981), and this court will notice plain error only in exceptional circumstances. *United States v. Adams,* 634 F.2d 830, 836 (5th Cir. 1981). There is no miscarriage of justice when proof of the defendant's guilt unaffected by the prosecutor's misconduct is so strong and convincing that the verdict would be unchanged. *See United States v. Giese,* 597 F.2d 1170, 1199 (9th Cir.), *cert. denied,* 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979). The prosecutor's comments here do not rise to the level of plain error.

Wicker's reliance on *Schuler* is misplaced. In *Schuler,* the Ninth Circuit held that the prosecutor's comments in closing argument about Schuler's laughter during testimony about threats Schuler made against the President, violated Fed.R.Evid. 404(a). The Ninth Circuit found that the prosecutor's remarks suggested to the jury that Schuler's laughter was relevant to show that he was of bad character because he considered charges of threatening the life of the President to be a joke. The Ninth Circuit further found that Schuler's behavior off the witness stand was legally irrelevant to the question of his guilt of the crime charged and amounted to a comment on his failure to testify in violation of the fifth amendment. *Schuler,* 813 F.2d at 982.

The defendant in *Schuler,* however, made a clear ob-

jection to the prosecutor's comment which was overruled by the district court. By overruling the objection, the district court reinforced the jury's impression that the defendant's behavior off the witness stand was appropriate evidence of guilt. *Schuler,* 813 F.2d at 981. In today's case not only was there no objection, but also the district court interrupted the prosecutor *sua sponte* immediately after these comments were made to remind her that she was making an improper argument about taxpayers bailing out failed savings and loans. While the district court did not call the prosecutor to task for commenting on Wicker's laughter, the cautionary comments that followed mitigated the impact of her remarks. The case against Schuler was not as strong as the case against Wicker. The prosecutor's improper comments do not rise to level of plain error.

The Prosecutor's "Personalizations" did not Constitute Plain Error

Wicker claims that the prosecutor made improper personalizations in argument to the jury. Wicker cites, for example, the prosecutor's statement to the jury:

> What real estate broker have you ever heard of that pays $25,905 for his clients in a real estate transaction? *I don't know of anybody that would do that* . . . .

She also said:

> the reason he writes checks and a 1099 is not because it is, in fact, a legitimate payment, because we wouldn't be here....; Could you and I do that?; *We* are not laughing, ladies and gentlemen, because *we* know who'd had to foot the bill.

Since Wicker's attorney did not object to any of these statements at trial, our review is, again, for plain error. We find these comments, although improper, not so

egregious as to rise to the level of plain error. The comments were primarily rhetorical. None could fairly be understood to express a personal belief by the prosecutor in Wicker's guilt. In addition, the district judge gave a cautionary instruction negating the prosecutor's inference that the jury could consider the possibility that they, as taxpayers, would foot the bill for the failure of the savings and loan in determining Wicker's guilt.

Comments on Crow's Guilty Plea

Wicker claims that the prosecutor made an improper comment about Crow's guilty plea. In closing argument, the prosecutor said:

> If it was a legitimate fee for brokering that Malcolm Crow did, why did Malcolm Crow plead guilty to two felony counts if he had gotten this $25,905.00 when he did some real work for Mr. Wicker.

At this point the Court interrupted and told the jury:

> Now, counsel, that's an improper argument, the fact that Malcolm Crow has plead guilty has nothing to do with whether or not this man is guilty.

The prosecutor's next remark was:

> Did Agent Herndon appear to you when he testified to be the type of person that threatened Mr. Crow into confessing?

The court again instructed the jury that Crow's plea was not evidence of Wicker's guilt.

The government argues that these comments were intended to rebut the defense's claim that Crow had been coerced into his testimony against Wicker by threats of prosecution. In opening argument, the defense counsel stated:

> It wasn't until the Federal Bureau of Investigation showed up and threatened him, after he had been in the grand jury for an hour or two that he decided maybe he did something wrong.

The government argues that they were entitled to a fair response to defense counsel's assertion. *See United States v. Binder*, 793 F.2d 1218 (5th Cir. 1986). They also argue that since defense counsel did not object to these comments we should review only for plain error. We find without elaboration that the district court's immediate and clear curative comments eliminated any effect these comments might have had on Wicker's substantial rights.

Cumulative Error

Wicker claims alternatively that, if no individual instance of prosecutorial misconduct reaches the level of reversible error, taken together they cumulate to require reversal. We do not agree.

There may be instances where improper statements, which are not individually prejudicial enough to require reversal, could cumulate to affect the defendant's substantial rights. *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979). However, such instances are rare in this circuit. *United States v. Iredia*, 866 F.2d 114 (5th Cir. 1989). Wicker's case is not one of those instances.

Most of the comments complained of went without objection. Others received curative instructions. The

remainder were noted by the court *sua sponte* and corrected immediately. Taken with the clear proof of guilt, the record shows none of Wicker's substantial rights were affected.

D. Brady and Giglio Evidence

Wicker claims that the prosecution failed to come forward with exculpatory evidence it possessed in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Specifically, he claims that the government failed to disclose a witness fee arrangement with Crow and that this information would have been a crucial tool it could have used to discredit the prosecution's star witness.

Information such as a witness fee constitutes impeachment evidence and is contemplated by *Giglio.* However, the record indicates that the defense counsel was aware, at trial, that the government was paying Crow's expenses for his stay at the Double Tree Hotel during the trial. The procedure for paying of witness fees is public information. 28 C.F.R. § 21.4. Moreover, no specific request for witness fee information was made by the defense. Absent such a request, and with Wicker's knowledge that the government was paying for at least a portion of Crow's expenses during the trial, we do not find a violation of *Brady* and *Giglio.*

IV.

Wicker's conviction and sentence are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-3631

FILED
JUL 5 1991

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SEABORN WICKER,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(July 5, 1991)

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

ENTERED FOR THE COURT:

/s/ Illegible

United States Circuit Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS/ STATUTES AT ISSUE

Fifth Amendment, U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. § 215 (LAW EFFECTIVE UNTIL OCT. 12, 1984):

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or dis-

count or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

Title 18 U.S.C. § 215 (LAW EFFECTIVE OCT. 12, 1984 - SEPT. 4, 1986):

(a) Whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, except as provided by law, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts receives or agrees to receive anything of value, for himself or for any other person or entity, other than such financial institution, from any person or entity for or in connection with any transaction or business of such financial institution; or

(b) Whoever, except as provided by law, directly or indirectly, gives, offers, or promises anything of value to any officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, or offers or promises any such officer, director, employee, agent, or attorney to give anything of value to any person or entity, other than such financial institution, for or in connection with any transaction or business of such financial institution, shall be fined not more than $5,000 or three times the value of anything offered, asked, given, received, or agreed to be given or received, whichever is greater, or imprisoned not more than five years, or both; but if the value of anything offered, asked, given, received, or agreed to be given or received does not exceed $100, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) As used in this section—

(1)'finanacial institution' means—

(A) any bank the deposits of which are insured by the Federal Deposit Insurance Corporation;

(B) any member, as defined in section 2 of the Federal Home Loan Bank Act, as amended, of the Federal Home Loan Bank System and any Federal Home Loan Bank;

(C) any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;

(D) any credit union the accounts of which are insured by the Administrator of the National Credit Union Administration;

(E) any Federal land bank, Federal land bank association, Federal intermediate credit bank, production credit association, bank for cooperatives; and

(F) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662); and

(2) 'bank holding company' or 'savings and loan holding company' means any person, corporation, partnership, business trust, association or similar organization which controls a financial institution in such a manner as to be a bank holding company or a savings and loan holding company under the Bank Holding Company Act Amendments of 1956 (12 U.S.C. 1841) or the Savings and Loan Holding Company Amendments of 1967 (12 U.S.C. 1730a).

(d) This section shall not apply to the payment by a financial institution of the usual salary or director's fee paid to an officer, director, employee, agent, or attorney thereof, or to a reasonable fee paid by such financial institution to such officer, director, employee, agent, or attorney for services rendered to such financial institutions.

Title 18 U.S.C. § 215 (LAW EFFECTIVE SEP. 4, 1986 - PRESENT):

(a) Whoever—

(1) corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution; or

(2) as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution;

shall be fined not more than $5,000 or three times the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted, whichever is greater, or imprisoned not more than five years, or both, but if the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted does not exceed $100 , shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) As used in this section, the term "financial institution" means—

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union share Insurance Fund;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422) [12 USCS § 1422], of

the Federal home loan bank system;
(5) a Federal land bank, Federal intermediate credit bank, bank for cooperatives, production credit association, and Federal land bank association;
(6) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662) [15 USCS § 662];
(7) a bank holding company as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 184) [12 USCS § 1841]; or
(8) a savings and loan holding company as defined in section 408 of the National Housing Act (12 U.S.C. 1730a) [12 USCS § 1730a].
(c) This section shall not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.
(d) Federal agencies with responsibility for regulating a financial institution shall jointly establish such guidelines as are appropriate to assist an officer, director, employee, agent, or attorney of a financial institution to comply with this section. Such agencies shall make such guidelines available to the public.

Title 18 U.S.C. § 1344. (LAW EFFECTIVE OCTOBER 1984-1990):

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—
(1) to defraud a federally chartered or insured financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody of control of a federally chartered or insured financial institution by means of false or fraudulent pretenses,

representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term 'federally chartered or insured financial institution' means—

(1) a bank with deposits insured by Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.

Title 18 U.S.C. § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor

only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Rule 404, Federal Rules of Evidence:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same:;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, indentity, or absence of mistake or accident.